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Supreme Court, U.S.
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No. 05-1505

IN THE SUPREME COURT OF THE UNITED STATES

GLORIA ALLRED, et al.,

Petitioners,

v.

SUPERIOR COURT OF CALIFORNIA, CONTRA COSTA COUNTY,

Respondent,

STATE OF CALIFORNIA, et al.,

Real Parties in Interest.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an attorney representing a witness in a high profile criminal trial, in which the court has issued a protective order applicable to all parties, material witnesses, and their attorneys, is exempt from the protective order by virtue of the fact that the attorney offers public commentary on legal matters.

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STATEMENT OF THE CASE

Real party in interest Scott Edgar Dyleski is currently on trial for murder in Contra Costa County, California. The victim was the wife of a locally prominent criminal defense attorney. Prior to a preliminary hearing, Dyleski moved for a protective order prohibiting the prosecution and law enforcement from discussing this case with the news media. The State joined in the motion and asked to expand the protective order to include anyone connected, directly or indirectly, with the investigation or prosecution. Petitioners Gloria Allred and her law firm are retained counsel for a witness.

The trial court issued a protective order on October 27, 2005, and an amended order on October 28, 2005. Petitioners moved to modify or set aside the order. The court held a hearing on November 16, 2005, and heard argument from defense counsel, the prosecutor, and petitioners. On November 21, 2005, the trial court issued the current protective order supported by

specific findings. Petitioners' request for clarification was denied.

The protective order prohibits "[t]he Office of the District Attorney, those investigating the case on behalf of the People, the Defendant, counsel for the Defendant, those investigating the case on behalf of the Defendant, Judicial Officers and Court staff, Sworn Peace Officers and Public Officials, and those who have been advised that they might be material witnesses in the matter or who have appeared and testified at either a preliminary examination or a grand jury investigating the matter, and all agents, attorneys or other representatives of such witnesses" from making any out-of-court statements concerning:

1. The nature, source, substance or effect of any purported evidence alleged to have been accumulated or to exist in regard to this matter.

2. The existence, or possible existence, of any document, exhibit or other physical evidence, the admissibility of which may have to be ruled upon by the court.

3. Any opinion or public comment as to the weight, value or effect of any evidence as tending to establish either guilt or innocence.

4. The identification or possible existence of any other person who might be alleged to have committed or participated in the commission of the subject crime.

5. The identification of any potential witness to the crime, or his or her probable testimony.

Pet. App. 3-4.

Petitioners opposed the protective order on the ground that it infringes upon the free speech rights of Ms. Allred who has been a public commentator for 30 years.

The trial court rejected petitioners' contention, reasoning as follows:

> The court does not find it necessary to bar any comment from Ms. Allred, nor to give an advisory opinion regarding any future communications. For one thing that may well constitute an unreasonable prior restraint upon free speech.

> Insofar as she is an attorney for a material witness, however, she will be subject to the same constraints as any other attorney representing a party or witness; she cannot engage in commentary that the witness herself could not engage in. Any party or witness can comment, for instance, on the wisdom of this court issuing the protective order. Ms. Allred is no exception. Neither the witness nor Ms. Allred, however, may preview evidence that might be provided by, or known to, the witness.

Pet. App. 11.

On January 12, 2006, the California Court of Appeal denied petitioners' petition for writ of mandate/prohibition. Pet. App. 1. On March 15, 2006, the California Supreme Court denied petitioners' petition for review. Pet. App. 2.

On May 25, 2006, petitioners filed an application for stay of the trial court's protective order. Real parties in interest opposed the application for stay. On May 26, petitioners filed a petition for writ of certiorari. On June 6, 2006, Justice Kennedy denied petitioners' application for stay. On July 20, the Court requested a response to the petition.

The protective order remains in effect. The jury in *People* v. *Dyleski* is currently deliberating.

REASONS FOR DENYING THE PETITION

Certiorari should be denied because the petition seeks review of the mere application to unique facts of a settled rule of law, the petition suggests no basis to conclude that the rule is the subject of any dispute among the nation's courts, the validity of the protective order likely will become moot before this Court might rule on it, the circumstances of this case are unique and are not likely to recur, and the order in any event was proper.

1. The law is settled regarding when the speech of lawyers in pending criminal cases may be restricted. This Court has made clear that "the 'substantial likelihood of material prejudice'

standard constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials." *Gentile* v. *State Bar of Nevada*, 501 U.S. 1030, 1075 (1990) (*Gentile*). Attorneys appearing before a court adhere to a standard different from the "clear and present danger" test applicable to members of the press because attorneys "are key participants in the criminal justice system, and the State may demand some adherence to the precepts of that system in regulating their speech as well as their conduct." *Id.* at 1074. The trial court here applied the correct test in deciding whether to issue the protective order, citing the "substantial likelihood of material prejudice" test of *Gentile*. Pet. App. 6-7. Petitioners quarrel with the result of the trial court's application of that rule to the peculiar facts of this case. But that is an improbable basis for a grant of certiorari. See Sup. Ct. Rule 10.

Petitioners insist, however, that courts have adopted conflicting tests to determine the validity of protective orders restricting the speech of attorneys, parties, and witnesses in pending cases: (1) clear and present danger of harm; (2) reasonable likelihood of harm; and (3) substantial likelihood that speech could pose a threat to fair adjudicatory proceedings. Pet. 10-15. Petitioners urge this Court to grant review to settle the law.

But petitioners are mistaken that a genuine or intolerable conflict exists in the law. A majority of the cases cited by petitioners predate this Court's 1990 decision in *Gentile*. See *In re Application of Dow Jones & Co., Inc.*, 842 F.2d 603, 610 (2d Cir.), *cert. denied*, 488 U.S. 946 (1988); *United States* v. *Ford*, 830 F.2d 596, 598 (6th Cir. 1987); *Levine* v. *U.S. Dist. Court*, 764 F.2d 590, 595 (9th Cir. 1985); *CBS, Inc.* v. *Young*, 522 F.2d 234, 239 (6th Cir. 1975); *Chicago Council of Lawyers* v. *Bauer*, 522 F.2d 242, 249 (7th Cir. 1975); *United States* v. *Tijerina*, 412 F.2d 661, 666 (10th Cir. 1969); *NBC* v. *Cooperman*, 501 N.Y.S.2d 405, 408 (N.Y.App.Div. 1986); *Kemner* v. *Monsanto Co.*, 112 Ill.2d 223, 244, 492 N.E.2d 1327, 1337 (1986).

Among the cases cited by petitioner, several decided after *Gentile* acknowledge its holding and apply the correct "substantial likelihood" standard. See *United States* v. *Scarfo*, 263 F.3d 80, 93 (3rd Cir. 2001); *United States* v. *Brown*, 218 F.3d 415, 426-27 (5th Cir. 2000); *Twohig* v. *Blackmer*, 121 N.M. 746, 750-51, 918 P.2d 332, 336-37 (1996). Two post-*Gentile* cases cited by petitioners applied a "reasonable likelihood" test. *In re Morrissey*, 168 F.3d 134, 139 (4th Cir. 1999); *State* v. *Bassett*, 128 Wn.2d 612, 616, 911 P.2d 385, 387 (1996). However, as we explain below, the difference between "substantial likelihood" and "reasonable likelihood" is one of mere semantics in the present context.

Petitioners rely on the dissent of Justice White, joined by Brennan, J. and Marshall, J., from the denial of a petition for writ of certiorari following the Second Circuit's decision in *In re Application of Dow Jones & Co., Inc.*, 842 F.2d 603. The dissent cited a split of authority concerning whether a restraining order directed against the parties and challenged only by the media constitutes a prior restraint on the freedom of expression. 488 U.S. at 947-48. The dissent also stated, "Moreover, the Second Circuit's adoption of a 'reasonable likelihood' standard conflicts with the Sixth Circuit's 'clear and present danger' standard." *Id.* at 948. The dissent, however, was written two years before the decision in *Gentile*.

The three "tests" noted by petitioners reflect more of a difference in semantics than a genuine split of authority. The "clear and present danger" test "was never intended to express a technical legal doctrine or to convey a formula for adjudicating cases." *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 842 (1978) (internal quotation marks omitted).

> Properly applied, the test requires a court to make its own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression. The

> possibility that other measures will serve the State's interests should also be weighed.

Id. at. 842-43.

Although courts have employed different labels for the test to be applied in deciding whether to issue a protective order, there is actually only one test: the trial court must assess the proximity and degree of harm and consider whether there are other less restrictive approaches to insuring a fair trial.

> The difference between the requirement of serious and imminent threat found in the disciplinary rules of some States and the more common formulation of substantial likelihood of material prejudice could prove mere semantics. Each standard requires an assessment of proximity and degree of harm. Each may be capable of valid application.

Gentile, 501 U.S. at 1037 (Kennedy, J., op. for four Justices).

Some courts have expressed the view that the different tests reflect a linguistic rather than a genuine difference, or tended to conflate one test with another. See, *e.g. United States* v. *Brown*, 218 F.3d at 427 (difference between "reasonable likelihood" and "substantial likelihood" is not clear); *CBS, Inc.* v. *Young*, 522 F.2d at 239 (order constitutional under "clear and present danger" or "reasonable likelihood" test); *Twohig* v. *Blackmer*, 121 N.M. at 751, 754, 918 P.2d 332, 337 ("clear and present danger" test differs "semantically" from "substantial likelihood of material prejudice" test; court applied both); *In re Hinds*, 90 N.J. 604, 622, 449 A.2d 483, 493 (1982) ("substantial likelihood of material prejudice" standard is a linguistic equivalent of "clear and present danger"), cited with approval in *Gentile*, 501 U.S. at 1037.

The trial court here recognized that the different labels used did not necessarily signal different tests when it referred to *Younger* v. *Smith*, 30 Cal.App.3d 138, 161, 106 Cal.Rptr. 225, 240 (1973): "[T]he court appears to put this alleged 'difference' in standards of proof aside, commenting that 'a reasonable likelihood of an unfair trial is, in itself, a clear and present

danger to the administration of justice.'" Pet. App. 7.

2. Nor is there any basis to conclude that courts are in conflict over the propriety of the rule or how it would apply in a case such as this one involving a "public commentator." To date, no court has held that a protective order cannot or should not apply to an attorney in a criminal case because that attorney is also a television commentator who wants to speak publicly about the case. The law is clear that, when extensive publicity threatens the fairness of a criminal proceeding, the trial judge should proscribe "extrajudicial statements by any lawyer, party, witness, or court official, which divulge[] prejudicial matters, such as . . . the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case." *Sheppard* v. *Maxwell*, 384 U.S. 333, 361 (1965). The communications of trial participants can be restricted where necessary to ensure a fair trial for a criminal defendant. *Gentile*, 501 U.S. at 1073.

As counsel for a witness, petitioner Allred stands in the same position as her client. She is, therefore, appropriately covered by the protective order. No party or witness can be allowed to frustrate a trial court's protective order by the simple expedient of retaining an attorney to speak on the witness's behalf. That is true whether or not the attorney's retainer extends to discussing the client's testimony.

3. The question presented is whether an attorney who represents a material witness in a high-profile criminal case is exempt from a protective order because she is a media commentator on legal matters. That question is not an important question justifying certiorari. Instead, it presents the unusual situation of an attorney representing a material witness in a high-profile case who asserts she should not be bound by a protective order, applicable to all attorneys and witnesses in the case, because she regularly comments on legal matters on television. This situation is not likely to recur with any frequency and petitioners are the only ones likely to be affected by resolution of the question. See Pet. App. 10 ("The position

of Gloria Allred, who joins the opposition to the current order, is unique.").

4. In addition, the petition should be denied because the trial in *People v. Dyleski* apparently will be completed before a decision is reached in this case. The jury is currently in deliberations.

It is true that, in cases involving protective orders directed at the *media*, this Court has found the case not moot even though the trial had concluded. This Court reasoned that the underlying dispute between the parties is one capable of repetition, yet evading review. *Press-Enterprise Co.* v. *Superior Court*, 478 U.S. 1, 6 (1986); *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 603 (1982); *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 563 (1980); *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 377 (1979); *Nebraska Press Assn.* v. *Stuart*, 427 U.S. 539, 547 (1976). To be "capable of repetition, yet evading review," two conditions must be satisfied: "'(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that *the same complaining party* would be subjected to the same action again.'" *Gannett Co.* v. *DePasquale*, 443 U.S. at 377 (emphasis added).

Here, no reasonable expectation appears that petitioners will be subjected to the same action again. According to petitioners, petitioner Allred "had never been gagged in the past despite representing many witnesses in high-profile criminal cases." Pet. 16. Given that acknowledgment, no reason exists to find a reasonable expectation petitioners will be subjected to the same action again.

5. Moreover, the trial court's protective order is proper. The trial court made highly specific findings that support it. It found that (1) the case of *People v. Dyleski* had "generated an extraordinary amount of pretrial publicity; an amount, in fact, that is very rarely seen in the instance of a murder of one individual" (Pet. App. 7); (2) the atmosphere so far in the case had been "highly charged leading to an environment that if

continued, makes it difficult at best to keep courtroom decorum and preserve a fair trial" (Pet. App. 7); (3) the nature of the case was such "that an early termination of this publicity, without court intervention, appears unlikely" (Pet. App. 8); and (4) "[a]lthough no court proceeding in this matter has yet included any evidence either as to the defendant (other than his age) or as to any motive for the killing, there have been numerous public statements as to both" (Pet. App. 8).

Newspaper accounts had described Dyleski as a teenager who "'wore eccentric, dark Goth clothing', was 'ambitious', lived a 'dark life', was a 'non-conformist', wore 'a long trench coat' and even was involved in devil worship'." Pet. App. 8. It had been reported that his motive for the killing was his involvement in a credit card scam and that he was buying equipment to grow marijuana. Pet. App. 8.

The trial court further found that publicity about the case had disseminated throughout the state as well as the nation, with coverage on CourtTV and MSNBC. Pet. App. 7. The prosecutor submitted to the trial court 92 pages of exhibits documenting extensive media reports about the case in local newspapers and the national media. "A reading of the press coverage of the matter . . . shows a general approach to any news on the matter that virtually presumes that the defendant is guilty of the crime with which he is charged." Pet. App. 7-8.

The trial court also narrowly tailored the protective order to proscribe only extrajudicial statements that could impact the fairness of trial, and applied it equally to all attorneys and witnesses participating in the case. The order does not ban all discussion of the case but only precludes a preview of the evidence. Pet. App. 9, 11. The protective order is consistent with *Sheppard* v. *Maxwell*, 384 U.S. at 361 ("[T]he trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as the refusal of Sheppard to submit to interrogation or take any lie detector tests; any statement made by Sheppard to officials; the identity of prospective witnesses or

their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case.").

Petitioners argue, "There is no reason why Ms. Allred should not be able to engage in public commentary unrelated to her client's potential testimony, including offering her opinions about other evidence or witnesses." Pet. 18. Petitioner Allred seeks to publicly comment on "[t]he manner in which petitioner's client was mistreated by the prosecution and the police . . . ." Pet. 18.

Petitioner Allred's client is not a party to the case of *People* v. *Dyleski*. It is on that individual's behalf that she seeks to utilize her role as television commentator to influence public opinion about her client, the prosecution, and the police. Petitioner Allred's commentary is likely to carry added weight in the public eye because she would be regarded as an insider to the legal proceedings and because she represents a potentially important witness. *Gentile*, 501 U.S. at 1074 ("Because lawyers have special access to information through discovery and client communications, their extrajudicial statements pose a threat to the fairness of a pending proceeding since lawyers' statements are likely to be received as especially authoritative.").

The trial court did not prevent any television commentator, "when not otherwise involved in the pending case, from commenting as he or she sees fit." Pet. App. 10. The trial court correctly ruled, "Insofar as [petitioner Allred] is an attorney for a material witness, however, she will be subject to the same constraints as any other attorney representing a party or witness; she cannot engage in commentary that the witness herself could not engage in." Pet. App. 11.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Dated: August 28, 2006

Respectfully submitted,

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